

# **FOIA Litigation Considerations**

**Part II**



# Summary Judgment

- FOIA litigation resolved by motion
- No disputed facts, only question of how the law applies to facts
- No live testimony, submission of sworn statements
- *Vaughn* affidavits or *Vaughn* declarations

# Vaughn Declarations

- Contents:
  - Identify declarant
  - State the number of records/pages being withheld and the number of pages released (in full or in part)
  - Set forth procedural history of request, including relevant correspondence
  - Describe the search for responsive records

# Vaughn Declarations

- The Vaughn Index
  - Describe records or portions of records withheld
  - Identify each exemption claimed
  - Connect each item withheld with the exemption asserted
  - Demonstrate that all required elements of each exemption are satisfied

# **Types of Vaughn Declarations**

## **Traditional Vaughn declaration**

- Document-by-document, page-by-page, line-by-line description of withheld information
- Useful when there are relatively few documents at issue



# Types of Vaughn Declarations

- “Coded” declarations
  - Useful for high-volume, multiple-exemption cases
  - Two parts:
    - Assigns an exemption code to each category of withheld information, for example (b)(7)(C)-1 for names of FBI Special Agents, (b)(7)(C)-2 for information that would identify a subject of an FBI investigation
    - Attach copies of redacted records with appropriate code marked next to each deletion
      - Privacy Act implications

# Types of Vaughn Declarations

- Categorical or generic declaration
  - Most frequently used in Exemption 7(A) cases
  - Assigns a functional category to each type of record involved and describes how disclosure would harm on-going law enforcement proceedings
  - Also can be used in some types of Exemption 6 and 7(C) cases

# **Types of Vaughn Declarations**

- “Glomar” denial declaration
  - Used only when an agency cannot confirm or deny the existence of records because it would reveal an exempt fact
  - “Records withheld” section of declaration explains only what abstract fact would be disclosed if agency confirmed that there were or were not records
  - Used most often for targeted requests involving Exemptions 1, 6 or 7C

# Types of Vaughn Declarations

- “Vaughning” only a sample of records
  - Used with a very large number of documents
  - Requester and court must agree to using this type of declaration
  - Sample by full document rather than by page
  - If court disapproves of application of exemptions, may need to reprocess all records



# Alternative to Vaughn Declarations

- FOIA expressly authorizes *in camera* inspection of records as alternative to filing *Vaughn* declaration
- Judge does not need a security clearance to review classified material, but law clerks do
- Physical security precautions needed

# Alternative to Vaughn Declaration

- *In camera* inspection conducted at discretion of the judge
- Done most often when agency's declaration found to be insufficient or when agency is found to have acted in bad faith



# Alternative to Vaughn Declaration

- Agency required to provide complete description of withheld information and rationale for withholding without disclosing exempt material
- Neither requester's attorney nor expert permitted to review *in camera* submission

# **Special “Vaughning” Problems**

## **■ Exemption 1**

- “Foreign government information”— identify country, if possible
- “Intelligence activities, sources or methods”
  - If possible, state whether an activity, a source or a method is at issue
  - If possible, state general nature of the activity, source or method

# Special “Vaughning” Problems

- Exemption 1 (cont'd)
  - “Foreign relations”—if possible, identify the nation and/or relationship between nations that could be impaired
  - Always state what national security harm would result from disclosure, except for foreign government information (harm is presumed)

# **Special “Vaughning” Problems**

## **■ Exemption 2**

- Explain why information is “internal”
- State whether withheld information is “high 2” or “low 2,” and if “high 2,” state how circumvention of agency regulation, practice, or program would result from disclosure

# **Special “Vaughning” Problems**

## **Exemption 3**

- Identify the federal statute being applied to withhold information pursuant to Exemption 3
- Explain how the statute applies to the withheld information

# **Special “Vaughning” Problems**

## **Exemption 4:**

- When agency is relying on substantial competitive harm argument, try to include declaration from submitter explaining how competitors would use information at issue to disadvantage
- Make clear that agency considered submitter's views on substantial competitive harm, but made independent decision

# Special “Vaughning” Problems

- Exemption 5
  - Explain whether the communication was inter- or intra-agency (*Klamath issues*)
  - Deliberative process privilege
    - Explain why information is predecisional
    - Explain why information is deliberative
    - State that all factual information has been disclosed or explain why it has not

# Special “Vaughning” Problems

- Attorney work product privilege
  - Identify on-going or anticipated litigation and how document pertains to it

## Attorney client privilege

- Explain how disclosure would identify confidential information provided by a client to the attorney in order to obtain legal advice

# Special “Vaughning” Problems

- Exemption 6
  - Describe privacy interest
    - Whose interest is involved and how is this personal information
    - Describe any particular harm from disclosure
    - If information is old, address whether subject is still living
  - Discuss whether there is any legitimate public interest, and assign it a magnitude

# Special “Vaughning” Problems

- Exemption 6 (cont'd)
  - State that the agency has balanced the privacy interest and the public interest, and that the privacy interest prevails

## Exemption 7 (all subparts)

- State the law enforcement purpose for which the records were created

# Special “Vaughnning” Problems

- Exemption 7 (cont'd)
  - (b)(7)(A)
    - State that all categories of information which could not reasonably be expected to interfere with law enforcement proceedings have been disclosed
    - Describe the information withheld in functional categories
    - Explain how disclosure of each function category could reasonably be expected to cause an identifiable harm

# Special “Vaughnning” Problems

- (b)(7)(C)
  - See Exemption 6 above
- (b)(7)(D)
  - If not a criminal/national security investigation, state that only information that could reasonably be expected to identify the confidential source has been withheld
  - If a criminal/national security investigation, describe investigation without revealing exempt information

# Special “Vaughning” Problems

- (b)(7)(D)
- State whether the confidential source was given an express or implied promise of confidentiality
- If dealing with implied promise of confidentiality, state the circumstances giving rise to the implied promise

# Duty to Segregate

- Declaration must specifically state that agency has disclosed all reasonably segregable non-exempt information
- If possible, give examples of the agency's efforts to disclose segregable non-exempt information
- If possible, describe the non-exempt information that was not disclosed

# **Waiver of Exemptions in Litigation**

- Because judicial review is *de novo*, exemptions may be asserted in litigation even though they were not previously relied upon in the administrative stage of processing the request
- All exemptions must be asserted in the agency's *Vaughn* declaration

# **Waiver of Exemptions in Litigation**

- District courts very reticent to permit assertion of new exemption after adverse decision
- Unlikely that agency will be permitted to assert a new exemption on remand after a court of appeals rules that the agency's first asserted exemption inapplicable
- Exemption 7(A) problems

# Attorney Fees

- A. Eligibility
  - Requester must have representational relationship with an attorney
  - Requester will have “substantially prevailed” only if he has obtained a judicially sanctioned “alteration of the legal relationship of the parties”

# Attorney Fees

- B. Entitlement
  - Court will consider the:
    - Public benefit
    - Commercial benefit to requester
    - The nature of the requester's interest in the records sought
    - Whether the agency's withholding had a reasonable basis in law